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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 663

CITY OF NEW ORLEANS, *et al.*,

Appellants,

—v.—

EVANGELINE BARTHE, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

MOTION TO DISMISS OR AFFIRM

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Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that this appeal be dismissed on the ground that this Court lacks jurisdiction, or that the final judgment and decree of the District Court be affirmed on the ground that the questions are so unsubstantial as not to warrant further argument.

Opinion Below

The opinion below is reported at 219 F. Supp. 788.

Statute

The statute declared unconstitutional by the District Court is Section 33:4538.1 of the Revised Statutes of Louisiana of 1950.

Questions Presented

For the purposes of this motion, appellees adopt the questions as presented by appellants at page 6 of their Statement as to Jurisdiction and add the following:

Whether this Court has jurisdiction of this appeal?

Statement

This appeal is from the judgment of the United States District Court for the Eastern District of Louisiana, entered on September 27, 1963, declaring unconstitutional LSA-R.S. 33:4558.1, which requires racial segregation in public parks and recreational facilities in the State of Louisiana, and enjoining appellants from acting pursuant thereto.

There is no dispute whatsoever that the park and recreational facilities and the entire recreational program of the City of New Orleans are segregated on the basis of race. This was admitted by the Director of the New Orleans Recreation Department (NORD) as well as by the Superintendent of the New Orleans Park and Parkway Commission (R. 14, 49, 50). When the Director of NORD was asked if this was the result of a law, custom, or policy of the department, he replied:

> Well, we consider it by law and by custom and by policy of the department (R. 14).

There are ninety-five playgrounds for whites and nineteen playgrounds for Negroes administered by NORD (R. 13). In addition, appellant New Orleans Parkway and Park Commission administers two parks—one, Portchartrain, for Negroes and another, West End, for whites (R. 48). The Director of NORD testified that there was a need for

additional white and Negro playgrounds but that there was a "bigger need" for Negro playgrounds (R. 43).

All of the recreational programs undertaken by NORD are divided into white and Negro divisions (R. 23) and administered on a completely segregated basis (R. 14). Although the NORD director testified that all of the programs available to whites are available to Negroes on a segregated basis except for the soap box derby, further testimony from him and from the Negro recreational supervisor indicated that there was no NORD All-American baseball league for Negroes, fine arts festival, charm school, bowling activities, travel theatre, or civic orchestra (R. 32, 33, 99). NORD's director contended that such things would be provided for Negroes if they asked (R. 32, 33), but very few NORD programs are initiated by this method (R. 99). Advertising of programs is made on a racial basis (R. 21, 22). Of the two hundred fifty employees in the NORD program, fifty to sixty of them are Negro but none is in an administrative position (R. 23).

The evidence contained a long procession of accounts of denials, insults and discriminations against Negroes seeking to use white parks. A Negro who sought to enter the soap box derby, the national winner of which receives a college scholarship, was refused entrance on the basis of race (R. 31, 76, 80, 81). One of the plaintiffs testified that his son, a minor Negro plaintiff, Gary Burns, had competed in a NORD-sponsored track race, emerged the victor, and then been ejected from the field, without his trophy, because he was Negro (R. 66-71). A group of Negroes playing baseball in the white Taylor Park was arrested even though there was enough room for white and Negro youngsters to play (R. 83, 84, 86-89). Other Negroes playing basketball were also arrested at Taylor Park (R. 90). The charges against the latter group were dismissed when the

police did not show up for the trial (R. 91). Still other Negroes were arrested or chased from public recreational areas (R. 105, 106, 107, 109, 110). Moreover, several white persons were refused permission to play golf on the all Negro Portchartrain Park (R. 49, 50).

On or about June 8, 1962, approximately one thousand Negroes, including the adult plaintiffs in this suit, submitted a petition to the appellants, Mayor, Councilmen of the City of New Orleans, and the Director of NORD, asking for desegregation of the park and recreational facilities. The same petition was submitted to the appellant New Orleans Park and Parkway Commission on or about October 31, 1962. The facilities were not desegregated.

On September 27, 1963, the lower court issued a judgment declaring LSA-R.S. 33:4558.1 unconstitutional and enjoining appellants from acting pursuant thereto. Appellants subsequently filed this appeal. They also filed a notice of appeal to the United States Court of Appeals for the Fifth Circuit.

ARGUMENT

I.

This Court Lacks Jurisdiction of This Appeal Because No Three Judge Court Was Necessary for Disposition Below. However, It Should Take Certiorari Jurisdiction and Render Judgment on the Merits.

This case involves the validity of a state statute requiring segregation in parks and recreational facilities in the State of Louisiana. The statute, LSA-R.S. 33:4558.1, reads as follows:

> Separation of white and colored races
>
> A. All public parks, recreation centers, playgrounds, community centers and other such facilities at which swimming, dancing, golfing, skating or other recreational activities are conducted shall be operated separately for members of the white and colored races. This shall not preclude mixed audiences at such facilities, provided separated sections and rest room facilities are reserved for members of white and colored races. This provision is made in the exercise of the state's police power and for the purpose of protecting the public health, morals and the peace and good order in the state and not because of race.
>
> B. "Public" parks and other recreational facilities as used herein shall mean any and all recreational facilities operated by the State of Louisiana or any of its parishes, municipalities or other subdivisions of the state.
>
> C. Any person, firm or corporation violating any of the provisions of this Section shall be deemed guilty of

> a misdemeanor and upon conviction therefor by a court of competent jurisdiction for each such violation shall be fined not less than five hundred dollars nor more than one thousand dollars, or sentenced to imprisonment in the parish jail not less than ninety days nor more than six months, or both, fined and imprisoned as above, at the discretion of the court. Acts 1956, No. 14, §§1-3.

Similar statutes and regulations have been repeatedly declared unconstitutional by this Court. *Watson* v. *City of Memphis*, 373 U. S. 526; *Johnson* v. *Virginia*, 373 U. S. 61; *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715; *State Athletic Commission* v. *Dorsey*, 359 U. S. 533; *New Orleans City Park Improvement Association* v. *Detiege*, 358 U. S. 54; *Gayle* v. *Browder*, 352 U. S. 903; *Holmes* v. *City of Atlanta*, 350 U. S. 879; *Mayor and City Council of Baltimore City* v. *Dawson*, 350 U. S. 877; *Brown* v. *Board of Education*, 347 U. S. 483; *Buchanan* v. *Warley*, 245 U. S. 60.

It follows that a three judge court was not required in this instance where "prior decisions make frivolous any claim that a state statute on its face is not unconstitutional." *Bailey* v. *Patterson*, 369 U. S. 31, 33; *Turner* v. *City of Memphis*, 369 U. S. 350.[1] Jurisdiction of this appeal is in the Court of Appeals and not in this Court. *Turner* v. *City of Memphis*, 369 U. S. 350, 353.

Nevertheless, appellees submit that there are compelling reasons for this Court to treat the jurisdictional statement as a petition for certiorari and to decide the issues on the merits prior to judgment in the Court of Appeals. It is

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[1] In the instant case the court below expressed doubt that a three judge court was necessary but nevertheless decided the case. The single district court judge who would otherwise have heard the case also adopted the findings and conclusions as his own. *Barthe* v. *City of New Orleans*, 219 F. Supp. 788, 789.

clear that this Court has such authority. 28 U. S. C. §§1254 (1), 2101(e); *Turner* v. *City of Memphis, supra; Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368. The statute is plainly unconstitutional and there is no dispute as to the facts. A decision by this Court on the merits will serve the interest of proper judicial administration by disposing of this litigation as expeditiously as possible and rendering extended proceedings in the Court of Appeals unnecessary.

II.

The Questions Presented by Appellants Are Unsubstantial.

This case presents once again the simple issue of whether a state may exclude Negroes from public recreational facilities. There is no dispute that the facilities involved are segregated. Such exclusion, based solely on race and color, has been repeatedly condemned as a violation of the Fourteenth Amendment:

> Discrimination in the use and enjoyment of public recreational facilities of any kind or nature owned and operated or owned and leased by the City, whether under color of law, statute, ordinance, policy, custom, or usage, is violative of the Equal Protection of the Laws clause of the Fourteenth Amendment to the Constitution of the United States. *Shuttlesworth* v. *Gaylord*, 202 F. Supp. 59, 62 (N. D. Ala. 1961), aff'd 310 F. 2d 303 (5th Cir. 1962).

See also *Watson* v. *City of Memphis*, 373 U. S. 526; *New Orleans City Park Improvement Association* v. *Detiege*, 252 F. 2d 122 (5th Cir. 1958), aff'd 358 U. S. 54 (outlawing segregation in one park in New Orleans); *Department of Conservation* v. *Tate*, 231 F. 2d 615 (4th Cir. 1955), aff'd

350 U. S. 877; *Muir* v. *Louisville Park Theatrical Association*, 347 U. S. 971, vacating and remanding 202 F. 2d 275 (6th Cir. 1953); *Holmes* v. *City of Atlanta*, 124 F. Supp. 290 (N. D. Ga. 1954), aff'd 223 F. 2d 93 (5th Cir. 1955), rev'd 350 U. S. 879; *Gilmore* v. *The City of Montgomery*, 176 F. Supp. 776 (M. D. Ala. 1959), aff'd 277 F. 2d 364 (5th Cir. 1960); *City of St. Petersburg* v. *Alsup*, 238 F. 2d 830 (5th Cir. 1956); *Moorhead* v. *City of Fort Lauderdale*, 152 F. Supp. 131 (S. D. Fla. 1957), aff'd 248 F. 2d 544 (5th Cir. 1957); *City of Greensboro* v. *Simkins*, 149 F. Supp. 562 (M. D. N. C. 1957), aff'd 246 F. 2d 425 (4th Cir. 1957); *Brown* v. *South Carolina State Forestry Comm.*, —— F. Supp. —— (No. 774, E. D. S. C. July 10, 1963); *Bohler* v. *Lane*, 204 F. Supp. 168 (S. D. Fla. 1962); *Willie* v. *Harris County, Texas*, 202 F. Supp. 549 (S. D. Tex. 1962); *Ward* v. *City of Miami, Florida*, 151 F. Supp. 593 (S. D. Fla. 1957); *Fayson* v. *Beard*, 134 F. Supp. 379 (E. D. Texas 1955).

Moreover, these cases are no more than specific applications of the broader principles that public facilities may not be segregated, *Johnson* v. *Virginia*, 373 U. S. 61, and that discriminatory classification based exclusively on color does not meet constitutional commands. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715.

Despite this long line of cases, appellants seek a reversal of the decision of the lower court on the grounds that (1) LSA-R.S. 33:4558.1, which requires segregation of the races in parks and recreational facilities, is a valid exercise of the state's police power, (2) appellees have not shown that this is a proper class action, and (3) no preliminary injunction should have issued. None of these arguments is novel. All have been rejected expressly and by implication in previous cases, cited herein.

Appellants seek to use the police power of the state to justify racial segregation. As long ago as *Buchanan* v. *Warley*, 245 U. S. 60, this Court decided that the police power could not be so used. That case, like this, involved the constitutionality of a statute requiring segregation. In the action for the specific performance of a contract to buy a house, the Negro defendant contended that the contract terms had not been met because the ordinance prevented his occupancy of the house. Rejecting an argument that the statute was a proper exercise of the state's police power, this Court stated (at page 74):

> The authority of the state to pass laws in the exercise of the police power, having for their object the promotion of the public health, safety and welfare, is very broad, as has been affirmed in numerous and recent decisions of this court . . . But it is equally well established that the police power, broad as it is, cannot justify the passage of a law or ordinance which runs counter to the limitations of the Federal Constitution.

Similarly, the argument was rejected last term in *Watson* v. *Memphis, supra,* in which it was argued that the state's obligation to prevent violence and disorder justified a delay in the desegregation of the recreational facilities of Memphis, Tennessee. See also *Dawson* v. *Mayor and City Council of Baltimore City, supra,* 220 F. 2d at 387; *Shuttlesworth* v. *Gaylord, supra,* 202 F. Supp. at 62; *Bohler* v. *Lane, supra,* at 173.

Equally untenable is the argument that no foundation was laid to show a proper class action. All of the recreation cases cited herein were class actions brought in the same manner as this case. As stated in *Willie* v. *Harris County, Texas, supra,* 202 F. Supp. 549, 555:

> But this court is not familiar with any principle which would prevent relief from extending to all members of the class similarly situated with the plaintiffs. The operation of the park on a segregated basis is admitted —the wrong extends to the entire class of which the plaintiffs are representative, and it is plainly within the sound discretion of this court to grant relief coterminous with the wrong.

See also *Evers* v. *Dwyer*, 358 U. S. 202; *Orleans Parish School Board* v. *Bush*, 242 F. 2d 156, 165 (5th Cir. 1957). Cf. *Brown* v. *Board of Education*, 349 U. S. 294; *Hecht Co.* v. *Bowles*, 321 U. S. 321, 329; *Porter* v. *Warner Holding Co.*, 328 U. S. 395, 398. Federal Rule 23 (a) (3) was intended to deal with just such situations in order to avoid a multiplicity of actions. Cf. Pomeroy's *Equity Jurisprudence* (5th Ed. Symons 1941), Vol. 1, §§260, 261 a-m; *Smith* v. *Swormstedt*, 16 How. (57 U. S.) 288.

The lower court's decision to grant a preliminary injunction cannot be disturbed without a showing of a clear abuse of discretion. *United States* v. *Corrick*, 298 U. S. 435, 437. Appellants, however, have made no such showing. Instead they contend that the appellants are "high class men" and that there is no showing that they would disobey the lower court's ruling that LSA-R.S. 33:4558.1 is unconstitutional. But appellees were entitled to relief by preliminary injunction from the moment they established that their constitutional rights were being violated. *Henry Greenville Airport Commission*, 284 F. 2d 631 (4th Cir. 1960); *Clemons* v. *Board of Education of Hillsborough*, 228 F. 2d 853, 857 (6th Cir. 1956); *Board of Supervisors of Louisiana State University* v. *Wilson*, 340 U. S. 909.

Appellants could not make a showing of abuse of discretion given the uncontradicted evidence of their discrimina-

tory practices. Facilities and programs were maintained on a racially segregated basis "by law and by custom and by policy of the department" (R. 14). Only nineteen playgrounds were available to Negroes as opposed to ninety-five for whites (R. 13). Negro facilities were "by no means equal to those available to white persons." *Barthe* v. *City of New Orleans*, 219 F. Supp. 788, 789. Many programs available to whites were unavailable to Negroes, including the soap box derby, the NORD All-American Baseball League, fine arts festival, charm school, bowling activities, traveling theatre, and civic orchestra (R. 31, 32, 33, 99). Program advertising was on a racial basis (R. 21, 22). Employment was rigidly segregated and no Negro was in an administrative position (R. 23). Witness after witness testified to insulting denials of the use of white facilities: at least one park was closed (R. 25, 26); one boy was ejected from a field without his trophy after winning a race (R. 66, 71); another could not compete for a college scholarship in the soap box derby (R. 76, 80, 81); and many Negroes were arrested while playing on white facilities (R. 83, 84, 86, 88, 89-91, 105-107, 109-110).

Thus the lower court was entirely justified in issuing its order for preliminary injunction. In doing so it simply followed long-standing precedents in which similar relief had been given. See cases cited at pages 7, 8, *supra*.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Motion to Dismiss or Affirm should be granted.

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